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9 SELECT PORTFOLIO SERVICING, INC.

10 **UNITED STATES DISTRICT COURT**  
11 **CENTRAL DISTRICT OF CALIFORNIA**

12 TERESA PITTS, an individual,

13 Plaintiff,

14 v.

15 BANK OF AMERICA N.A., a national  
16 association; SELECT PORTFOLIO  
17 SERVICING, INC., a Utah corporation; and  
18 DOES 1 through 50, inclusive,

19 Defendants.

CASE NO. 2:14-cv-03144-JFW-AJW

Hon. John F. Walter

**DEFENDANT SELECT  
PORTFOLIO SERVICING,  
INC.'S REPLY IN SUPPORT OF  
ITS MOTION TO DISMISS  
PLAINTIFF'S COMPLAINT**

Date: June 30, 2014

Time: 1:30 p.m.

Courtroom: 16

**REPLY IN SUPPORT OF ITS MOTION TO DISMISS**

Defendant Select Portfolio Servicing, Inc. (“SPS” or “Defendant”) files this Reply in Support of its Motion to Dismiss and respectfully shows the Court the following:

**INTRODUCTION**

In her opposition to SPS’ Motion to Dismiss, Plaintiff Teresa Pitts (“Plaintiff”) focuses exclusively on her claim that SPS should be bound by the obligations created under Bank of America N.A.’s (“BANA”) Settlement Agreement with her simply because SPS is the successor servicer. She claims SPS is reaping the benefits of the Settlement Agreement, and therefore, under Section 1589 of the California Civil Code, SPS should also shoulder the burden of the Settlement Agreement. As set forth herein, though, Plaintiff’s argument fails to raise a right to relief against SPS above the speculative level. Section 1589 does not apply here because the Settlement Agreement is subject to the statute of frauds. As such, SPS could not have impliedly assumed BANA’s obligations thereunder as a matter of law. Even if SPS could have somehow impliedly assumed the obligations set forth in the Settlement Agreement, Plaintiff has failed to allege facts plausibly suggesting this was intended. Further, Plaintiff has failed to plausibly demonstrate any express assumption of the obligations. For these reasons alone, dismissal is appropriate.

In addition, Plaintiff has ignored SPS’s arguments that she failed to identify any breach of the Settlement Agreement by SPS; indeed, Plaintiff has not pleaded that she asked SPS to review her for a modification and it refused. Plaintiff has also ignored SPS’s arguments with regard to her failure to plead any plausible damages. Plaintiff is still enjoying continuous possession of the Property, despite having been in default since at least 2011 and despite having a current balance due of approximately \$285,000. Plaintiff has waived these matters and, as set forth herein and in SPS’s Motion to Dismiss, all of her claims against SPS should be dismissed with prejudice.

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**ARGUMENT**

**PLAINTIFF HAS FAILED TO ADEQUATELY PLEAD SUCCESSOR  
LIABILITY TO SUPPORT HER CLAIMS**

In her Opposition to the Motion to Dismiss, Plaintiff argues Section 1589 of the California Civil Code applies to impose successor liability with respect to the Settlement Agreement against SPS. This statute provides that “[a] voluntary acceptance of the benefit of a transaction is equivalent to a consent to all the obligations arising from it, so far as the facts are known, or ought to be known, to the person accepting.” Cal. Civ. Code § 1589. Plaintiff contends, in a purely conclusory manner, that SPS had knowledge of the Settlement Agreement before the service-transfer.

As an initial matter, nowhere in the Complaint does Plaintiff make such allegations. She has not alleged facts plausibly demonstrating SPS had knowledge of the obligations in the Settlement Agreement before becoming servicer of Plaintiff’s loan. Regardless, Section 1589 does not apply in this case. “Section 1589 has no relevance to contracts governed by the statute of frauds.” *Greenwood & Co. Real Estate v. C-D Inv. Co.*, 18 Cal.Rptr.2d 144, 173 (Cal. App. 1993), rev. granted, opinion superseded on other grounds by 19 Cal.Rptr.2d 520 (Cal. May 20, 1993) (citing Cal. Civ. Code § 1624(d) and *Boyd v. Big Three Ranch Co.*, 22 Cal.App. 108, 133 (1913)). It is well-settled that loan contracts, like Plaintiff’s, including any modifications of the rights provided thereunder, are subject to the statute of frauds. *Secrest v. Sec. Nat’l Mortg. Loan Trust 2002–2*, 167 Cal.App.4th 544, 553 (2008); *Newsom v. Bank of America, N.A.*, No. No. EDCV 12–01935 VAP, 2014 WL 2180278, at \*7 (C.D. Cal. May 22, 2014); (see Complaint indicating the current balance due on the loan is approximately \$285,000; see also Exhibit A to Complaint indicating the original principal balance of Plaintiff’s loan was \$516,800). Because the Settlement Agreement constitutes an agreement by BANA not to foreclose for a time, the Settlement Agreement alters the rights set forth in the loan and is subject to

1 the statute of frauds. *Secrest*, 167 Cal.App.4th at 553-54. Therefore, Section 1589  
 2 cannot apply to impose any implied successor liability or obligations here. Implied  
 3 assumption of obligations is inappropriate where the contract must be in writing.

4 Even if implied liability could be imposed, Plaintiff has not alleged facts to  
 5 plausibly suggest SPS impliedly assumed the obligations set forth in the Settlement  
 6 Agreement. Implied assumption of obligations is determined by the intent of the  
 7 parties as indicated by their acts, the subject matter of the contract or their words.  
 8 *Pacini v. Nationstar Mortgage, LLC*, No. C 12-04606, 2013 WL 2924441 at \*4-5  
 9 (N.D. Cal. June 13, 2013) (citing *Weidner v. Zieglar*, 218 Cal. 345, 349-50 (Cal.  
 10 1933)); *See* Cal. Civ. Code § 1636. “Such intent is to be inferred, if possible, solely  
 11 from the written provisions of the contract.... If contractual language is clear and  
 12 explicit, it governs.” *Powerine Oil Co., Inc. v. Superior Court*, 37 Cal.4th 377, 390  
 13 (2005) (internal citations omitted); Cal. Civ. Code § 1639. Here, the Settlement  
 14 Agreement is perfectly clear. It expressly provides that it is “only between Plaintiff  
 15 and [BANA].” (Complaint at Exhibit A, Settlement Agreement at ¶ 4.1 and p. 1 of 7.)  
 16 No provisions are made in the Agreement for the extension of BANA’s obligations  
 17 thereunder to subsequent servicers. There is no provision in the Settlement  
 18 Agreement that it shall be binding on successors and assigns. *See Weidner*, 218 Cal.  
 19 at 349-50 (where there is a provision that the contract is binding on successors, “no  
 20 express assumption of those obligations by an assignee ...[is] necessary.”). In  
 21 addition, Plaintiff has alleged no facts with regard to the intent of the parties. She has  
 22 only alleged conclusions that SPS assumed all contractual arrangements and  
 23 liabilities. (*See* Complaint at ¶¶ 45-47.) These conclusions are not sufficient to state a  
 24 claim against SPS. *See Pacini*, 2013 WL 2924441, at \*4-5. Indeed, Plaintiff has not  
 25 referenced any alleged assignment or purchase agreement between BANA and SPS.  
 26 There is no such agreement. As Plaintiff admits, these parties are only loan servicers,  
 27 who service loans on behalf of the owners of the loan. The servicers’ agreements are  
 28 with the owners, not each other. *See id.* (“Simply because the [deed of trust]

1 contemplates that changes in the loan servicer may occur does not imply that a  
 2 transfer of liability automatically occurs.”).

3 Plaintiff has also failed to allege facts to plausibly suggest there was an express  
 4 assumption of the obligations of the Settlement Agreement. She has not identified  
 5 where such an express assumption may be found, to whom it was made, or any other  
 6 details. Her only allegations on an express assumption of obligations are purely  
 7 conclusory. (*See* Complaint at ¶¶ 45-47.) Plaintiff has failed to allege facts sufficient  
 8 to allow the Court to infer SPS became bound by the Settlement Agreement.

9 Plaintiff has also failed to allege facts plausibly suggesting SPS breached the  
 10 Settlement Agreement. As set forth in the Motion to Dismiss, nowhere in the  
 11 Complaint is a claim that Plaintiff requested a modification review from SPS and SPS  
 12 refused. Also nowhere is a plausible statement of injury. Plaintiff has opted not to  
 13 address these failures in her Opposition. Accordingly, she has waived any arguments  
 14 on these issues and the breach of contract claim should be dismissed as to SPS on  
 15 these bases.

16 Because Plaintiff’s declaratory judgment claim against SPS rests on her theory  
 17 that SPS should not foreclose without performing under the Settlement Agreement  
 18 (*see* Opposition at p. 7), this claim too fails. *Glue-Fold, Inc. v. Slautterback Corp.*, 82  
 19 Cal. App. 4th 1018, 1023 n.3 (2000); *Estillore v. Countrywide Bank FSB*, No. 10-  
 20 1243, 2011 WL 348832, \*26 (E.D. Cal. Feb. 2, 2011).

### 21 CONCLUSION

22 For the foregoing reasons, and those set forth in the Motion to Dismiss, SPS  
 23 respectfully requests that the Court grant its Motion to Dismiss each cause of action in  
 24 the Complaint against it, without leave to amend, and grant such further relief as the  
 25 Court deems just and proper.

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**Locke Lord LLP**  
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Los Angeles, CA 90071

1 Dated: June 16, 2014

Respectfully submitted,

2 LOCKE LORD LLP

3  
4 By: /s/ Conrad V. Sison

5 Conrad V. Sison

6 Attorneys for Defendant SELECT  
7 PORTFOLIO SERVICING, INC.  
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**CERTIFICATE OF SERVICE**

I, Conrad V. Sison, an attorney, do hereby certify that on June 16, 2014, I electronically filed the foregoing **DEFENDANT SELECT PORTFOLIO SERVICING, INC.'S REPLY IN SUPPORT OF ITS MOTION TO DISMISS PLAINTIFF'S COMPLAINT** with the Clerk of the Court using the electronic case filing system, which will send notification of such filings to the parties registered with the Court's CM/ECF system.

Dated: June 16, 2014

By: /s/ Conrad V. Sison  
Conrad V. Sison

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